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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. NEIMAN MARCUS THOMPSON, Defendant and Appellant.	2d Crim. No. B216060 (Super. Ct. No. NA078714-01) (Los Angeles County)

Neiman Marcus Thompson appeals from the judgment entered following his conviction by a jury of two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2),[1] one count of making criminal threats (§ 422), and one count of possession of a firearm by a felon. (§ 12021, subd. (a)(1).) The jury found true allegations that, in the commission of the two assaults, appellant had personally used a firearm. (§ 12022.5, subd. (a).) Appellant admitted one prior prison term (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)(1)), and one prior serious or violent felony conviction within the meaning of the "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) He was sentenced to prison for 19 years, 4 months.

Appellant contends that the trial court erroneously admitted evidence of a witness's belief that a threat made by a third party had indirectly come from appellant. The third party warned the witness, Shauntika Parham, not to come to court. In addition,

[1] All statutory references are to the Penal Code unless otherwise stated.

appellant contends that (1) the trial court erroneously failed to instruct the jury that the threat evidence was admitted for the limited purpose of evaluating Parham's credibility, (2) trial counsel was ineffective because she did not request a limiting instruction, (3) the trial court had a duty to instruct sua sponte pursuant to CALCRIM No. 371, and (4) the trial court erroneously admitted evidence that Parham was concerned for the safety of her young daughter. We direct the trial court to correct clerical errors in two minute orders and the abstract of judgment. In all other respects, we affirm.

Trial Evidence

At approximately 8:00 p.m. on May 27, 2008, Julius Moore, Harold Edwards, Shauntika Parham, and appellant were at Aja's Bar in Long Beach. Appellant told Moore "that he was going to go break [into Parham's] car and see if she had money in her car." Moore informed Edwards and Parham of appellant's intention. Parham confronted appellant and accused him of trying to rob her. Appellant looked at Moore and yelled: " 'Who put my name out there in the streets? Who put my name in they [*sic*] mouth? I got a burner. I got a biscuit for people like that.' " Moore understood the term "biscuit" to mean a firearm. Appellant said that he was going to "let off a couple rounds" with the biscuit. Appellant "stormed out" of the bar. Before leaving, he said: " 'Don't trip. I'm going to be right back. I'm fixing to go get mine.' "

Moore, Edwards, and Parham drove to the house of Edwards's mother, which was a block away from the bar. Moore was seated inside his truck and was talking through an open window to Edwards and Parham, who were standing outside by the driver's door. Appellant approached Moore's truck and pointed a revolver at Moore, Edwards, and Parham. Appellant said, " 'Yeah. I could have bust on you niggas right now. Now who talking about me? Who got my name in they mouth?" Moore "smashed on the gas . . . and took off."

Admission of Parham's Belief Concerning Threat; Limiting Instruction

At trial, Parham testified that she could not recall what had occurred during the incident on May 27, 2008. Nor could she recall discussing the incident with the police. The prosecutor asked Parham if she had told a detective that she was scared to come to

court. Defense counsel objected, and a sidebar conference was conducted outside of the hearing of the jury. Defense counsel said that, based on Evidence Code section 352 and a lack of foundational requirements, she would object to the admission of any evidence as to why Parham was scared to come to court.[2] Counsel expressed concern that the evidence would show that Parham had told the police that she was scared because she had received a threatening telephone call from appellant's father. Counsel stated: "[T]here's no way that it can be established it was my client's father and even if my client had any role in that . . . ."

The trial court overruled defense counsel's objection. The court stated: "You [the prosecutor] can ask [Parham] did [she] tell [the detective] that [she was] afraid, and then you may ask her did [she] tell him [she was] afraid because [she] received phone calls . . . that [she] believe[d] indirectly came from [appellant] and leave it at that." The court said that it was going to allow the prosecutor to ask these questions "only to explain the reason why she's not remembering today." The court further declared: "I don't think it is hearsay. I think it explains why she's testifying the way she is, and it's only coming in for that reason."

The prosecutor asked Parham, "Didn't you tell the detective that you had received a phone call that warned you not to come to court that you believed indirectly came from the defendant?" Parham responded, "I do not recall that."

After Parham had finished testifying, the prosecutor called Officer Brendan Murphy. Murphy testified that, immediately after the incident, he had interviewed Parham. Parham said that, while she was standing next to Moore's vehicle, appellant "walked up behind her and pointed a gun at her." Parham "said that [appellant] said, 'I could have just shot all of you. Who be talking shit now?' "

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[2] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The prosecutor subsequently called Detective Victor Thrash. Thrash testified that, on June 9, 2008, 13 days after the incident, he had interviewed Parham. Parham recounted the incident without any memory problems. On February 9, 2009, two days before Parham's trial testimony, she told Thrash "that she was scared of [appellant] and that she had an eight year old daughter that she was in fear of her safety." Parham also "said that she received a phone call from an individual that warned her not to come to court, and she believed that that indirectly came from the defendant."

Appellant does not dispute the admissibility of evidence that Parham was afraid to testify and had received a threatening telephone call from a third party. Appellant claims that the trial court erroneously admitted Parham's belief that the threat "indirectly came from the defendant." Appellant argues that he was not involved in trying to suppress Parham's testimony and that the trial court abused its discretion in permitting the jury to hear Parham speculate that appellant instigated the threatening call."

Based on *People v. Burgener* (2003) 29 Cal.4th 833, we conclude that the trial court did not err in admitting Parham's belief that appellant had been indirectly responsible for the threat. In *Burgener* a 1981 guilt judgment had been affirmed but the penalty (death) had been reversed. The defense attempted to impeach a witness's "detailed testimony at the 1988 penalty retrial with her inability to recall certain details during her testimony at the 1981 guilt phase trial." (***Id***., at p. 868.) The witness "explained that she had been afraid to tell the truth in 1981 because of threats made against her and her children . . . ." (***Ibid***.) The witness "identified defendant as the source of the threats and testified that the threats had been conveyed to her by LeRoy Yant, who had been in jail with defendant." (***Id***., at p. 869.) "Defense counsel . . . moved to strike [the witness's] testimony about the threats as hearsay and 'prejudicial.' The trial court denied the motion, observing that the evidence was relevant to [the witness's] credibility. Before testimony resumed, the court instructed the jury that the evidence of threats communicated to [the witness] was not being offered for its truth but only 'as communications that she heard and, as you may consider them in whatever way they may relate to credibility. Not for the truth of it.' " (***Ibid***.)

Our Supreme Court upheld the trial court's ruling. It explained: "Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court. [Citations.] In this case, the threats explained why [the witness's] testimony in 1981 differed in certain respects from her current testimony." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869.)

The Supreme Court rejected the defendant's complaint that "no evidence corroborated [the witness's] claim that defendant had threatened her." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869.) The court explained: "There is no requirement . . . that threats be corroborated before they may be admitted to reflect on the witness's credibility. Indeed, it is not necessary to show the witness's fear of retaliation is directly linked' to the defendant for the threat to be admissible. [Citation.] It is not necessarily the source of the threat - but its existence - that is relevant to the witness's credibility. In this case, evidence of the threats was relevant to explain why [the witness] testified as she did in 1981. [Citation.] Inasmuch as the jury was promptly and correctly instructed as to the limited purpose of the evidence, we cannot say that the trial court abused its discretion under Evidence Code section 352 in allowing the testimony. [Citation.]" (***Id***., at pp. 869-870.)

In the instant case, as in *Burgener*, the trial court admitted evidence of Parham's uncorroborated belief that appellant had threatened her through a third party. Unlike the trial court in *Burgener*, the trial court here did not instruct the jury "as to the limited purpose of the evidence." (*People v. Burgener, supra,* 29 Cal.4th at p. 870.) We reject appellant's claim that the trial court erred in not giving a limiting instruction. The court made its ruling during the prosecutor's direct examination of Parham. Outside of the hearing of the jury, the court said that it would admit evidence of the threat "only to explain the reason why she's not remembering today." The prosecutor then asked Parham, "Didn't you tell the detective that you had received a phone call that warned you not to come to court that you believed indirectly came from the defendant?" Parham

answered, "I do not recall that." In view of Parham's lack of recollection, it would have been inappropriate at that time for the trial court to have given a limiting instruction on the threat evidence. Such evidence had not yet been presented. Thus, when the trial court made its ruling to admit the threat evidence during Parham's direct examination, it did not abuse its discretion under Evidence Code section 352. The situation here is different from *Burgener*, where the trial court both made its ruling and gave a limiting instruction after the witness had testified about the threat and after defense counsel had moved to strike the witness's testimony.

In the instant case, evidence of the threat was not presented until Detective Thrash's subsequent testimony that, two days before Parham's trial testimony, she had "said that she received a phone call from an individual that warned her not to come to court, and she believed that that indirectly came from the defendant." At this point, it was incumbent upon defense counsel to request a limiting instruction if she wanted one. Based on the trial court's prior ruling during Parham's direct examination, counsel should have known that appellant would be entitled to such an instruction upon request. But counsel remained silent. Unlike defense counsel in *Burgener*, defense counsel here did not make a motion to strike Thrash's testimony about the threat.

As an alternative to requesting a limiting instruction immediately after Thrash's testimony, appellant could have requested that such an instruction be included among the instructions read to the jury before it retired to begin deliberations. But appellant made no such request. Appellant has not cited any authority holding that evidence of threats made to a witness is not admissible for credibility purposes unless the trial court instructs sua sponte on the limited purpose of the evidence. *Burgener* did not so hold. Because appellant never requested a limiting instruction, a limiting instruction was not required. (*People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3 ["absent a request by defendant, the trial court has no sua sponte duty to give a limiting instruction"]; *People v. Freeman* (1994) 8 Cal.4th 450, 495 ["Although the court apparently offered to instruct the jury on the purpose for which it could consider this evidence, it never did. Defendant did not, however, request such an instruction, which waives the issue."].)

Appellant claims: "The admission of [the threat] evidence, without any limiting instruction, violated . . . appellant's federal constitutional rights to due process and a fair trial." Appellant "waived his constitutional claims by failing to articulate them below. [Citations.] Those constitutional claims, which depend on a finding that the threat evidence was hearsay, are also meritless. This evidence was not offered for its truth." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869.) Furthermore, as we discuss below, trial counsel may have had a sound tactical reason for not requesting a limiting instruction.

Effective Assistance of Counsel

Appellant argues that defense counsel's failure to request a limiting instruction resulted in the denial of his constitutional right to the effective assistance of counsel. The standard for evaluating appellant's claim of ineffective counsel is enunciated in *Strickland v. Washington* (1984) 466 U.S. 668. "First, [appellant] must show that counsel's performance was deficient. . . . Second, [appellant] must show that the deficient performance prejudiced the defense." (***Id.***, 466 U.S. at p. 687.)

"Judicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington*, *supra*, 466 U.S. at p. 689.)

Appellant has not shown that counsel's performance was deficient. A reasonable attorney could have concluded that a limiting instruction would have been detrimental to appellant because it would have highlighted the threat evidence. (See *People v. Hinton* (2006) 37 Cal.4th 839, 878 ["Defendant also complains that counsel's failure to request a limiting instruction concerning his prior murder conviction demonstrated ineffective assistance, but counsel may have deemed it unwise to call further attention to it"]; *People v. Maury* (2003) 30 Cal.4th 342, 394 ["A reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide"]; *People v. Freeman*, *supra*, 8

Cal.4th at p. 495 [failure to request limiting instruction on evidence of defendant's prior robbery conviction not ineffective assistance because trial counsel "may well not have desired the court to emphasize the evidence"]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 934 ["the decision not to request [a limiting instruction] was a reasonable tactical choice by defense counsel to avoid directing the jury to focus on the evidence"].)

CALCRIM No. 371

Appellant contends that the trial court had a duty to instruct sua sponte pursuant to CALCRIM No. 371, which provides in relevant part: "If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself." (Brackets omitted.)

Appellant's contention is meritless. In *People v. Najera* (2008) 43 Cal.4th 1132, 1139, our Supreme Court noted with approval that the Bench Notes to CALCRIM No. 371 state: " 'No authority imposes a duty to give this instruction sua sponte.' " Furthermore, CALCRIM No. 371 would have been inappropriate because the threat evidence was not offered to show appellant's consciousness of guilt.

Parham's Concern for Daughter's Safety

Appellant contends that the trial court erroneously admitted Detective Thrash's testimony that Parham had said she "was concerned for the safety of her young daughter based on the telephone call." Appellant did not object to the admission of this testimony and has therefore forfeited the issue. (*People v. Kelly* (2007) 42 Cal.4th 763, 793.)

Clerical Errors

The trial court imposed a four-year prison term on each of counts 3 (criminal threats - § 422) and 5 (possession of firearm by a felon - § 12021, subd. (a)(1)). But it stayed execution of the sentences on these counts pursuant to section 654. Both the

minute order of the sentencing hearing and the abstract of judgment do not reflect the stay. These documents must be corrected.

The minute order for the verdicts shows that appellant was found guilty of the crime of criminal threats (§ 422) as charged in count 4. The jury's verdict form, however, shows that appellant was found not guilty on count 4. The minute order must be corrected to conform to the verdict form.

Disposition

The trial court is directed: (1) to correct the minute order of the sentencing hearing conducted on March 12, 2009, and the abstract of judgment to show that, pursuant to section 654, it suspended execution of the sentences imposed on counts 3 (criminal threats - § 422) and 5 (possession of firearm by a felon - § 12021, subd. (a)(1)); and (2) to correct the minute order for the verdicts returned by the jury on February 17, 2009, to show that appellant was found not guilty of the crime of criminal threats (§ 422) as charged in count 4. The trial court is further directed to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

James B. Pierce, Judge

Superior Court County of Los Angeles

Renee Rich, under appointment by the Court of Appeal, for Defendant and Appellant.

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